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 Oct. 3.  
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CHARLES R. GROFF.....CLAIMANT ;

AND

THE SNOW DRIFT BAKING }  
 POWDER COMPANY OF } RESPONDENTS.  
 BRANTFORD, ONTARIO..... }

*Trade-mark—First use—Cancellation of registration in favor of prior transferee—The Trade Mark and Design Act (R. S. C. c. 63) sec. 11.*

First use is the prime essential of a trade-mark, and a transferee must, at his peril, be sure of his title.

2. In the year 1885, the respondents, by their corporate title, registered a trade-mark, consisting of a label with the name "Snow Flake Baking Powder" printed thereon, in the Department of Agriculture. Some four years after such registration by respondents, the claimant applied to register the word-symbol "Snow Flake" as a trade-mark for the same class of merchandise,—stating that he knew of the respondents' registration, and alleging that it was invalid by reason of prior use by him and his predecessors in title. The evidence sustained the claimant's allegations.

*Held*, that the word-symbol in question had become the specific trade-mark of the claimant by virtue of first use, and that the registration by respondents must be cancelled.

**THIS** was an application to cancel the registration of a trade-mark on the ground that the persons who had made such registration were not the first to use the same in Canada, and were not entitled to its use. The application was made under *The Trade Mark and Design Act* (R.S.C. c. 63) section 11 (1).

(1). Sec. 11. If any person makes application to register, as his own, any trade-mark which has been already registered, and the Minister of Agriculture is not satisfied that such person is undoubtedly entitled to the exclusive use of such trade-mark, the Minister shall cause all persons interested in the matter to be notified to appear, in person or by attorney, before him, with their witnesses, for the purpose of establishing which is the rightful owner of such trade-mark ; and after having heard the said persons and their witnesses, the Minister shall order such entry or cancellation or both, to be made

March 22nd, 1889.

The matter was heard before the Deputy Minister of Agriculture.

*Woodward*, (St. Paul, Minn.) for the claimant ;

*Boulbee*, for the respondents.

The facts of the case are recited in the decision.

LOWE, D.M.A. now (October 3rd, 1889) rendered his decision.

The case arose out of the facts that on the 21st of August, 1885, a trade-mark consisting of a label with the name "Snow Flake Baking Powder" printed thereon, was registered in Folio 2533, in Register No. 11, in the name of the Snow Drift Baking Powder Company, of the City of Brantford, Province of Ontario ; and that, on the 7th of September last, an application was made by Mr. Charles R. Groff, of St. Paul, Minnesota, U.S.A., for the registration of the word-symbol "Snow Flake" for the same class of merchandise, stating at the same time that he understood there was already registered a trade-mark under that name, he claiming that such registration was illegal, because of prior use by him and his predecessors, and asking that the matter be adjusted in virtue of the provisions of section 11 of *The Trade Mark and Design Act*.

In obedience to the law, all the parties were duly notified of the issue, and to appear at two o'clock on the 22nd March, 1889, with their evidence.

The hearing took place on the day named before me. Oral evidence was adduced, which was supplemented by documents subsequently received from the claim-

as he deems just ; and in the absence of the Minister, the deputy of the Minister of Agriculture may hear and determine the case and make such entry or cancellation or both, as he deems just.

2. Errors in registering trade-marks and oversights in respect of conflicting registrations of trade-marks may be corrected in a similar manner.

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ant, copies of which were communicated to Mr. Boulton, counsel, on behalf of the respondents.

In support of the fact of prior use, Mr. Woodward has put in the original certificate granted by the United States Patent Office, at Washington, of a trade-mark in favor of C. C. Warren & Co. of Toledo, Ohio, through Charles C. Warren, a member of the said firm, under date May 1st, 1877, No. 4,598, such certificate defining that the trade-mark consists of the word-symbol "Snow Flake," applied to baking powder and that such firm had used the said trade-mark for a period of nearly, or about, ten years previously. We have here undoubted evidence of use before the date of the declaration of the Snow Drift Baking Powder Company, of Brantford, Ont., on the 19th of August, 1885, in which that company, in accordance with sections 8 and 10 of the *Trade Mark and Design Act*, stated that they "verily believed the said word-symbol "Snow Flake" was theirs on account of having been the first to make use of the same;" and it was in virtue of this declaration that the company obtained registration, in the absence of information to the contrary.

I find from documents submitted, that:—

On May 10th, 1882, the firm of C. C. Warren & Co. sold to James B. Baldy the trade-mark in question.

On July 25th, 1882, James B. Baldy gave power of attorney to Charles C. Warren to sell and convey all effects and interests of the late firm of C. C. Warren & Co.

On August 1st, 1882, James B. Baldy, by Charles C. Warren, *ès qualité* as attorney, transferred it to Alvine M. Woolson, except as respects Minnesota and Dakota.

On September 16th, 1882, Alvine M. Woolson transferred it to the Woolson Spice Company, except as respects Minnesota and Dakota.

On October 6th, 1883, the Woolson Spice Company

transferred it to Charles R. Groff, with warranty, except as to Minnesota and Dakota.

On January 21st, 1885, James B. Baldy transferred to Charles R. Groff, the right in such trade-mark in Minnesota and Dakota.

Several affidavits, made at Winnipeg, were submitted and read by Mr. Woodward, as to the prior use of the trade-mark in question in Winnipeg, by Mr. Groff, before its registration at Ottawa by the Brantford Snow Drift Baking Powder Company in 1885; but exception was taken to these documents by Mr. Boulton on the ground that the signatures had been affixed under oath, instead of under declaration, in accordance with Chapter 141, Revised Statutes of Canada, respecting Extra Judicial Oaths. I, therefore, do not think it well to make any further reference to these documents as a ground of my decision.

There were also submitted and read three depositions made at St. Paul, Minnesota, sworn to and subscribed before Thomas E. Leedington, Notary Public, under his notarial seal.

In one, Charles R. Groff, the claimant in this case, deposed that he began making baking powder in St. Paul in 1874, under the trade-mark "Snow Flake," in his capacity of secretary and general manager of the Chemical Manufacturing Company; that the firm of Groff & Berkey sold baking powder in Winnipeg, Manitoba, under the trade-mark "Snow Flake," in 1877; and that it had been sold there every year since, until October, 1888, when he received a notice from the Snow Drift Baking Powder Company of Brantford, Ontario, to stop such sales, as they claimed to be the owners of this trade-mark as applied to baking powder in Canada.

Another of these depositions, that of William R. Spangler, clerk and book-keeper to Charles R. Groff,

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recites that he has been familiar with the details of the business of Mr. Groff; that to his personal knowledge Mr. Groff had been selling baking powder under the trade-mark "Snow Flake" since 1880; that it was his duty to keep track of shipments; that there were sales to parties in Winnipeg on the dates of the copies adduced of several invoices in February, 1882, the correctness of such copies being sworn to by him.

Another, and the third of these depositions, by Richard Forde, residing at St. Paul, Minnesota, recites that from about September, 1880, until June, 1884, he resided at Brantford, Province of Ontario; that between the dates mentioned he was employed by Jackson Forde, Grocer and Manufacturer of baking powder; that on or about the 1st of February, 1884, the "Snow Drift Baking Powder and Grocers' Company" was incorporated; that such company was the successor of the said Jackson Forde; that he (Richard Forde) was a member of such corporation from its organization until June, 1884, and held the office of manager therein; that as such he was cognizant of all the details of the business of Jackson Forde and of the said corporation; that to his certain knowledge the said Jackson Forde, or the corporation, did not, prior to June, 1884, manufacture or sell baking powder under the name of "Snow Flake;" and that to his certain knowledge it was a matter of common report among the members of the said corporation that prior to June, 1884, baking powder was being sold in Winnipeg under the name of "Snow Flake." If this statement is accepted, it shows that the manager of the said company at least had knowledge of the prior use of the word-symbol in question by another.

The registration of the trade-mark in 1885 was asked for by the "Snow Drift Baking Powder Company," of Brantford. The deposition of Richard Forde, put in

by Mr. Woodward, describes the company as the "Snow Drift Baking Powder and Grocers' Company," of Brantford, which is the designation of a "limited" corporation in the Secretary of State's Department, of which Jackson Forde and Richard Forde were corporate members and provisional directors in 1884.

I find from the preceding recital, and particularly from the several transfers referred to, that the title of Charles R. Groff to the trade-mark "Snow Flake," as applied to baking powder, is sufficient to give him a right to ask the office for registration.

An objection by Mr. Boulton, to which I think it well to refer, was to the effect that he had seen a case reported by which it was decided that the words "Snow Flake" cannot be a trade-mark. He referred to a decision in the United States, in which the words in question were disposed of, namely, in the case of *Lawrence v. Lewis*, in which it was decided that the words "Snow Flake," in their common, ordinary sense, cannot be a trade-mark. Mr. Boulton did not furnish me with a report of the case, and I have been unable to find the book in the library from the reference he gave. I do not, however, find any difficulty in this point. It is admitted at once that the words "Snow Flake" belong to the public domain. It happens that the words used as symbols in nearly all trade-marks belong also to the public domain. But it does not follow that the word-symbol "Snow Flake," as specifically applicable to baking powder, is not a fanciful designation; and, therefore, proper for registration as a specific trade-mark. I have no doubt whatever on this point, and it is simply as to the sufficiency of the words for registration, in the sense stated, that I have the responsibility of dealing. The office does not in the most remote degree entertain the idea of a right of property in the symbols constituting a trade-mark, apart from the use

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or application of them to a vendible commodity. The words in question were registered as a trade-mark by the United States Government at Washington in 1877, and in this office in 1885. It may be pointed out that if this objection of Mr. Boulton were tenable it would invalidate the claim of his clients, as well as that of Mr. Groff.

The evidence accepted for deciding this case of registration was documentary, with the exception that Mr. Woodward declared, at the hearing, that he had purchased "Snow Flake" in 1880. Previous consent was given by the office, on account of the great expense of bringing witnesses from St. Paul and Winnipeg, to accept documentary evidence, unless it should be subsequently found that it was necessary to call witnesses, in which event an opportunity for oral evidence would be afforded.

Mr. Boulton objected to such permission, and claimed that he should have the right to cross-examine witnesses, under oath. To this, reply was made that I had no power to administer an oath in this investigation; that it was the custom of the Department to accept documentary evidence in such cases; and further, that the reliance of the Department simply was, that those who had substantial interest in the issue would adduce the necessary evidence to sustain it. The Act simply imposes on me the duty of satisfying myself, by any means in my power, without reference to any form of procedure, as to the fact of a prior use of a trade-mark for the purpose of registration. A trade-mark is an equivalent of a commercial signature, and its imitation is held to be forgery. First use is the prime essential. A transferee, therefore, must, at his peril, be sure of his title. It follows from this position that the Department accepts as a ground for registration the declaration of an applicant,

and in the case of a transfer *primâ facie* evidence of the fact.

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Mr. Boulton did not adduce any evidence on behalf of his clients, nor even allege that they used the trade-mark in question before the date of the United States Government registration, the production of which, simply and absolutely, renders invalid the registration by his clients in 1885. I called his attention to this material point at the hearing, and asked him specifically if he could tell me when his clients first began to use the word-symbol in question as a trade-mark. He answered me that he did not know.

In view, therefore, of the facts established to my satisfaction :—

1st., I decide that the registration in favor of the "Snow Drift Baking Powder Company," of Brantford, in Folio 2533, in Register No. 11, on the 21st of August, 1885, of the trade-mark consisting of a label, with the name "Snow Flake Baking Powder" printed thereon, must be cancelled ; and

2ndly., I decide that the application of Charles R. Groff for registration of the said word-symbol as a trade-mark, applicable to baking powder, must be granted.